IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.603 OF 2000

Ismail Imam Ladkhan. ...Appellant
(Orig.Accused No.3)

V/s.

The State of Maharashtra. ...Respondent

WITH

CRIMINAL APPEAL NO.652 OF 2000

Khairun Imam Ladkhan ...Appellant
(Orig.Accused No.1)

V/s.

The State of Maharashtra. ...Respondent

Appearance in above matters :-

Ms.Sharmila Kaushik, Advocate appointed for Appellants.
Ms.U.V. Kejriwal, A.P.P. for the State.

CORAM : V.G. PALSHIKAR,
ANOOP. V. MOHTA, JJ.

DATED : OCTOBER 28, 2004.

ORAL JUDGMENT (PER ANOOP V. MOHTA, J.) :-

1. Both these appeals are filed by the appellants being aggrieved by the common judgment and order passed by the Additional Sessions Judge, Gadhinglaj, whereby

they have been convicted under Section 302 read with 34 of Indian Penal Code (for short "IPC") and sentenced to suffer imprisonment for life and fine of Rs.500/- each and in default, rigorous imprisonment for two months. All the appellants have been acquitted for the offences punishable under Section 498-A read with Section 34 of IPC. Therefore, these appeals against the order of conviction.

2. The prosecution case leading upto the date of the conviction can be crystalised as under ;-

. The deceased Hasina Ismail was married with the appellant-accused no.3 on 6th September, 1988. Appellant-accused no.1 was the mother-in-law and appellant no.2 was the sister-in-law of the deceased. The appellant-accused no.3 was living with the deceased at Gadhinglaj with their sons viz. Aarif, age 11 years and Sammat, age 6 years. Appellant-accused no.1 was living in the same house in a separate room. On 10th May, 1999 at about 8.00 a.m. while quarrelling, appellant no.1 caught hold of hair of Hasina and

appellant no.3 alleged to had poured kerosene on the body of the deceased. Appellant no.1, thereafter, threw the fire from the fireplace on the body of the deceased, with her leg. The deceased caught fire. Appellant no.3 and one neighboured Raju Bastage had tried to extinguish the fire by pouring water on the body of the deceased. The younger son Sammat (PW-7) had witnessed the occurrence. The deceased was taken to the hospital of Dr.Pattanshetty at Gadhinglaj and later on she was referred to C.P.R. Hospital, Kolhapur. The police recorded the statement of the deceased at 1.45 p.m. on 10th May, 1999, wherein, she narrated that she had sustained burns due to kerosene flames accidently. The relatives of the deceased visited the hospital to whom the deceased had disclosed the incident again. Thereafter, on 11th May, 1999 at 8.55 p.m., second dying declaration of the deceased was recorded by the police in the presence of Medical Officer and maternal cousin brother of Hasina. On the basis of the second dying declaration, offence was registered against the accused under Sections 498-A, 307 read with Section 34 of IPC. However, on 12th May, 1999, the deceased succumbed to

burns injury. Therefore, offence was registered against the accused under Section 302 read with Section 34 IPC. The panchanama of the scene of offence, Exhibit-24 was drawn. The kerosene tin, partly burnt clothes and other materials were seized from the spot of the incident and those articles were sent for Chemical Analyser's report. Dr. Baban Nangre (PW-6) had submitted his post mortem report and opined that the deceased died due to 80% burns. After completion of the investigation, the charges were framed against all the accused. The same were denied by them and pleaded not guilty.

3. The defence of the appellant was that the deceased had sustained burns accidentally, due to sudden flames of the kerosene stove. She caught fire as the kerosene fell over the burning lamp and it flared up.

4. The learned Sessions after considering the material, as well as, evidence on the record, held that the deceased death was homicidal. Appellants no.1 and 3 had caused the death of the deceased with requisite intention and knowledge and therefore, convicted them

under Section 302 read with Section 34 of IPC. However, all these accused were acquitted for the offences punishable under Section 498-A read with Section 34 of IPC.

5. Heard learned Counsel appearing for the parties. After going through the record, as well as, the testimonies of the witnesses and related documents and after reappreciating the evidence and material placed on the record, we find that there are two dying declarations, Exhibit-31 dated 10th May, 1999 at 1.45 p.m. and Exhibit-43 dated 11th May, 1999 at 8.55 p.m. The second dying declaration was recorded after more than 24 hours from the first dying declaration. The deceased in her first dying declaration, Exhibit-31 which was made in conscious condition, as endorsed by the Medical Officer of C.P.R. Hospital, Kolhapur, Dr.M.M. Patil, wherein, she had narrated that kerosene fell on the lamp as she was filling the kerosene in the stove and as fire flared up, she got burnt. She shouted for help. Her husband, accused no.3, as he was sleeping, got up and came near to her to extinguish the

fire and therefore, he was also got burns injury. Her husband had also poured water to extinguish the fire. She had further narrated that the incident took place about 8.00 a.m. in the morning. This dying declaration by her has been proved by PW-4.

6. PW-4 Bhausaheb Tukaram Gavli, as per the deposition, visited the hospital and inquired from Dr.Patil, Medical Officer incharge about the physical and mental condition of the deceased, to take statement. After ascertaining and satisfying the same, the statement was recorded and as narrated in Exhibit-30. This witness has further deposed that when the deceased was giving her statement, she was conscious. Her signature was also taken. The endorsement of Dr.Patil was also at Exhibit-30. Till 8.00 p.m. on 10th May, 1999, nobody had lodged the complaint. PW-4 has deposed that some relatives were present, therefore, he had asked them to go out while he was recording her first dying declaration. The Executive Magistrate was not contacted by this witness. Therefore, on the basis of the first dying declaration, the involvement of the

appellants no.1 and 2 was out of the picture. This dying declaration was recorded on 10th May, 1999 at about 1.40 p.m., when the patient was conscious to make the said statement. Therefore, now it is necessary to consider the second dying declaration on the basis on which the learned Judge has convicted the appellants no.1 and 3. One basic aspect which cannot be overlooked at this stage is that the second dying declaration was recorded on 11th May, 1999 at about 8.55 p.m. i.e. after 24 hours of the first dying declaration. PW-4 has deposed that some relatives were present when he was recording the first dying declaration but he asked them to go out. It appears that there are basic improvements in the second dying declaration made by the deceased. The narration shows in the second declaration that she was tutored. The various improvements and new statements has been made against accused no.1, 2 and 3. In the second dying declaration, she had narrated about the various quarrels, disputes and the harassment by accused nos.1, 2 and 3. However, the learned Judge after considering the evidence, as well as, the materials on the record, has acquitted all the accused

for the offences under Section 498-A read with Section 34 of IPC but convicted under Section 302 read with Section 34 IPC.

7. In the second dying declaration, the deceased had involved and inflicted and made allegations against accused nos.1, 2 and 3 and narrated that as she was sitting near the fireplace, her husband had poured kerosene on her person and appellant no.1 had thrown the fire, by her leg and that caused fire and she got burnt because of that. The deceased had further narrated that her husband appellant no.3 had tried to save her by pouring the water. One Raju Bastage was also present at that time and had poured the water. In the second dying declaration, she had narrated and mentioned about the presence of younger son Sayed who had witnessed the incident. The second dying declaration was endorsed by PW-9. In the second dying declaration, she narrated that she had given first dying declaration on 10th May, 1999 under threat and under influence. The second dying declaration was given in presence of her cousin brother Vilasrao. Therefore, we are confronted with the two

dying declarations made by the deceased. Considering the gap between two dying declarations of more than 24 hours, specially when, at the time of first dying declaration, the relatives of the deceased were also present prior to the recording of her first dying declaration and as PW-4 had requested them to wait outside, at the relevant of the recording of the dying declaration. There was no such allegations or narrations against the appellants were made by the deceased in the first dying declaration. The presence of her elder son was also not narrated. However, in the second dying declaration, she had made a lot of improvements and made various new statements and involved the appellants, for the first time. Therefore, according to us, it is difficult to maintain conviction based on second dying declaration in the facts and circumstances of the case.

8. PW-7 Sammat aged 6 years, has deposed that at about 9.00 a.m. her mother was brushing her teeth outside her house. At that time, her grandmother accused no.1 had started taking away tiffin and baskets.

His mother told her grandmother that tiffin to be given to his father. Suddenly, appellant no.1, the grandmother of this witness lifted the tiffin and caught hold of hair of the deceased and pressed her neck and inflicted kick blows on the person of the deceased. Thereafter, appellant no.3 brought kerosene from one tin and poured on her. Appellant no.1 threw the burning material from fireplace with the help of her leg. He has deposed that his father and his grandmother set ablaze her mother. This witness has deposed that he had neither informed this incident to his neighbourhoods nor he shouted at the time of the incident. This witness has deposed that his mother had asked him to call Kabirchacha when his father had gone to answer the call of the nature after the incident. He sat at the house of Kabirchacha for 15 minutes. It appears from the testimony of this witness that he was fully tutored to give evidence in this matter. The behaviour of this child, aged 6 years, of not reacting immediately or not shouting or not telling to any neighbours, raises various doubts including of the presence of this witness child at the relevant time. The other witnesses nowhere

supports the prosecution case so far as incident in question is concerned.

9. The material as collected from the spot of occurrence, even if accepted cannot be sufficient to convict the appellants in view of two contradictory dying declarations made by the deceased herself. The first dying declaration appears to be natural and was made immediately after the incident. The second dying declaration raises various doubts. PW-10, API of Police Station has supported prosecution story so far as the investigation is concerned. There is no doubt about the homicidal death, as duly proved by the medical evidence also.

10. There was no complaints by the parents of Hasina on 10th May, 1992 when appellant no.3 took the deceased for the treatment. Admittedly, the second dying declaration was recorded in the presence of PW-5 Dilavarkhan. The statement of PW-7 Sammat was recorded after four days of the incident. There was no injury on accused no.1. Dilavarkhan was an interested witness.

This witness had signed the statement of the deceased. Balu Nabi Shaikh was also an interested witness. No other witnesses have been examined by the prosecution to support the prosecution case or to corroborate the other witnesses, including PW-7.

11. In the present case, therefore, the second dying declaration raises various doubts about the involvements of appellants no.1 and 2. The second dying declaration made by deceased if confronted with the first dying declaration, it breaks the link of evidence to support the prosecution case beyond reasonable doubt. The other witnesses also nowhere support the prosecution case beyond reasonable doubt that the appellants had only committed crime and it was not accidental death. The first dying declaration itself shows that it was accidental death. In the present case as observed above, if prosecution has failed to establish the case under Section 498-A and the Court has already acquitted the accused, in that circumstances also, the other evidence to support the prosecution case about the harassment and/or ill-treatment by the appellants also

looses its strength. It is difficult to belive the sole testimony of the young child aged 6 years (PW-7) regarding the occurrence of the incident in view of first dying declaration itself.

12. The alleged extra judicial statement by accused no.3 is also difficult to accept, as so called confession was made to the person (PW-8 Balu) who was relative of the deceased. Basically when it is not corroborated by any other independent witness. PW-8, had criminal antecedent, as he had undergone life imprisonment. There were various omissions in his evidence. The evidence of PW-5, relative of the deceased was also not free from infirmities.

13. For the reasons recorded above, we are of the view that the prosecution has failed to prove beyond reasonable doubt that appellants have committed the offence under Section 302 read with Section 34 IPC. In view of two contradictory dying declarations of the deceased, it is difficult to maintain the order of conviction against appellants no.1 and 3 specially when

they are acquitted on the basis of the same evidence under Section 498-A of IPC. There is merit in the appeal. There is no direct evidence to support the prosecution case. The evidence of PW-7, for want of corroboration and other circumstances apart from the deceased first dying declaration itself raises various doubts and this dislinks the prosecution case. Therefore, it cannot be said that appellants have committed the offences, beyond reasonable doubt. The impugned judgment and order is quashed and set aside.

14. Both the appeals are allowed and the appellants/accused no.1 and 3 are directed to be released, if they are not required in any other offences.

15. The appointed Advocate is entitled for Rs.750/- (each) towards quantified fee for the appeals.

(V.G. PALSHIKAR, J.)

(ANOOP. V. MOHTA, J.)